

BEFORE THE
Federal Communications Commission
 WASHINGTON, DC 20554

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 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)
)
 Revision of the Commission's Rules to Ensure) CC Docket No. 94-102
 Compatibility with Enhanced 911 Emergency) RM-8143
 Calling Systems)

COMMENTS OF PRIMECO PERSONAL COMMUNICATIONS, L.P.

PrimeCo Personal Communications, L.P. ("PrimeCo"),¹ hereby files brief comments in support of the petitions filed by BellSouth Corporation ("BellSouth") and the Cellular Telecommunications Industry Association ("CTIA") (collectively "Petitioners") seeking reconsideration of certain provisions of the Commission's December 1997 *Memorandum Opinion and Order* in the above-referenced proceeding.²

I. THE COMMISSION SHOULD PERMIT CMRS PROVIDERS TO FILE VOLUNTARY INFORMATIONAL TARIFFS GOVERNING CARRIER LIABILITY FOR WIRELESS E911 SERVICE

In light of the Commission's terse treatment of carrier liability in the *Reconsideration Order*, and the interstate aspects of CMRS service, PrimeCo agrees with petitioners that the Commission should now permit CMRS providers to file voluntary informational tariffs establishing the terms and conditions of carrier liability for E911 service for non-subscribers and subscribers alike. The Commission's E911 rules prohibit

¹ PrimeCo is the broadband A/B Block PCS licensee or is the sole general partner/majority owner in the licensee in the following MTAs: Chicago, Milwaukee, Richmond-Norfolk, Dallas-Fort Worth, San Antonio, Houston, New Orleans-Baton Rouge, Jacksonville, Tampa-St. Petersburg-Orlando, Miami and Honolulu.

² *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Memorandum Opinion and Order*, CC Docket No. 94-102, RM-8143, FCC 97-402 (rel. Dec. 23, 1997) ("*Reconsideration Order*").

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carriers from utilizing mechanisms — such as validation procedures and service initialization — which might establish an implied contract between the carrier and the 911 caller.³ As a result, the Commission’s inaction with respect to carrier liability to non-customers has left CMRS providers in a jurisdictional “no-mans-land.”

To promote CMRS competition, the Commission has appropriately adopted a mandatory detariffing policy for CMRS providers, and Congress and the Commission have preempted states from imposing tariffing requirements for CMRS providers’ intrastate services.⁴ LECs, however, typically utilize state PUC tariffs to govern liability to customers, including liability relating to E911 services, and such tariffs typically disclaim a relationship with any parties other than the customer.⁵ A CMRS carrier’s liability to its customers is instead governed primarily by carrier-customer contract but, as the Commission acknowledged, privity with third parties is nonexistent.⁶ Further, states have generally been unwilling to afford CMRS carriers the same liability protection that LECs may afford themselves by contract.

³ 47 C.F.R. § 20.18(b).

⁴ 47 U.S.C. § 332(c)(3)(A); 47 C.F.R. § 20.15(c); *Implementation of Sections 3(n) and 332 of the Communications Act — Regulatory Treatment of Mobile Services, Second Report and Order*, 9 FCC Rcd. 1411, 1480, 1504-07 (1994).

⁵ *See Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 18676, 18727 (1996) (“*E911 First Report and Order*”); *Pettit v. C&P Tel. Co. of Va.*, 18 Va. Cir. 112, (Va. App. 1992). Liability limitation is traditionally considered part of the ratemaking process. *See Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571 (1921).

⁶ *Reconsideration Order* ¶ 140. With respect to non-customers, the Commission simply stated “that it would appear reasonable for a carrier to attempt to make the use of its network by a non-subscriber subject to the carrier’s terms and conditions for liability.” *Id.*

The solution proposed by BellSouth and CTIA fills this jurisdictional void without undermining the Commission's pro-competitive detariffing policy toward CMRS providers. Informational FCC tariffs provide a cost-efficient means of putting subscribers and non-subscribers alike on notice as to the terms and conditions of 911 service.⁷ PrimeCo also agrees with CTIA that such tariffs should not be subject to prior approval or review, should be presumed lawful and not require the filing of cost support data. As Petitioners discuss, authorizing CMRS providers to file federal informational tariffs is consistent with Commission precedent and sound public policy.⁸

II. OTHER ISSUES

CTIA requests reconsideration or clarification of other issues carriers have confronted in their efforts to comply with the Commission's E-911 rules. PrimeCo supports CTIA on some of these matters, as follows:

PrimeCo particularly supports CTIA's request for clarification that PSAPs may not refuse to enter into a cost recovery agreement while claiming compliance with the cost recovery rules by asking the carrier to recover costs directly through charges to

⁷ Under the *Priester-Esteve* doctrine, carriers' tariff provisions limiting liability are given the effect of law. *Western Union Tel. Co. v. Priester*, 276 U.S. 252 (1928), *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566 (1921); see *Marco Supply Co., Inc. v. AT&T*, 875 F.2d 434, 436 (4th Cir. 1989); *MCI Telecommunications Corp. v. TCI Mail, Inc.*, 772 F. Supp. 64 (D.R.I. 1991); *Policies and Rules Concerning Toll Fraud, Notice of Proposed Rulemaking*, 8 FCC Rcd 8618, 8639-40 n.61 (1993); *Richman Bros. Records, Inc. v. U.S. Sprint Communications Co., Inc.*, 10 FCC Rcd. 13639, 13641-42 (Com. Car. Bur. 1995).

⁸ See BellSouth Petition at 3-4, nn. 7-10 and CTIA Petition at 14 n.33 (citing *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, FCC 97-293, 9 Comm. Reg. (P&F) 145 (rel. Aug. 20, 1997)).

its CMRS customers.⁹ As a threshold matter, CMRS providers *are not subject to rate regulation* and are *already* free to pass these costs through to consumers; thus, these PSAPs are essentially making the absurd contention that the Commission's decision to forbear from CMRS rate regulation renders all PSAPs in compliance with the Commission's cost recovery rules.

The record in this proceeding demonstrates instead that a "cost recovery mechanism" triggering a carrier's E-911 obligations requires formal legislative action on the part of state and/or local governments. For example, the Public Safety-Wireless Consensus Agreement, which initiated the Commission's formal consideration of cost recovery issues, states that "[t]he parties agree to work in good faith *toward the adoption of state and local legislation* fairly designed for cost recovery" consistent with principles of cost-based recovery and nondiscrimination.¹⁰ Also, as the Commission noted, the parties "propose[d] essentially to rely on state and local funding mechanisms, which could be in the form of public appropriations or bond issues, with or without a separate 911 subscriber line fee."¹¹ The Commission itself clearly expected affirmative efforts on the part of state and local legislative bodies, stating

We agree . . . that local and state governments have pursued innovative and diverse means for the funding of wireline E911 ser-

⁹ CTIA Petition at 17-18.

¹⁰ CTIA *et al.*, *Ex Parte* Presentation in CC Docket No. 94-102, filed February 13, 1996, at 3.

¹¹ *E911 First Report and Order*, 11 FCC Rcd. at 18720 (citing Consensus Agreement at 3).

vices, and that it is reasonable to anticipate that these governments *will follow a similar course with regard to wireless E911.*¹²

Thus, to ensure that CMRS providers are adequately and equitably compensated for the costs of providing E-911 service, state and local governments must affirmatively act to address cost recovery issues in a nondiscriminatory and competitively neutral manner as a prerequisite to carriers' E-911 obligations.

Finally, PrimeCo supports clarification that carriers — not PSAPs — ultimately must select their own Phase I and Phase II E-911 transmission technology.¹³ PrimeCo is aware that some PSAPs are favoring a particular vendor, even though the technology is not cost-effective or optimal for a carrier's network. As a practical matter, CMRS carriers and public safety agencies will need to cooperate in their E-911 implementation efforts; it is critical, however, that E-911 implementation not favor one technology over another, and that cost recovery mechanisms be competitively neutral. Otherwise, carriers will suffer due to a lack of vendor choices, and the Commission's stated objectives of "ubiquitous E911 operational compatibility" and "the avoidance of state-by-state technical and operational requirements that would burden equipment manufacturers and carriers" would be undermined.¹⁴ Carriers and PSAPs benefit most in

¹² *E911 First Report and Order*, 11 FCC Rcd. at 18722 (emphasis added).

¹³ CTIA Petition at 18-22.

¹⁴ *See E911 First Report and Order*, 11 FCC Rcd. at 18729-30. A carrier's right to select its choice of vendor is directly related to the need for equitable and competitively neutral cost recovery mechanisms (discussed *supra*). As CTIA discusses in its petition, "[d]ifferent CMRS systems will confront different E911 compliance costs based, among other things, upon the technology chosen and the number of customers served who are non-subscribers. . . ." CTIA Petition at 18. Allowing PSAPs to second-guess a carrier's vendor choice as a means of limiting its cost recovery obligations would undermine CMRS competition as well as the
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an environment in which their respective networks are compatible with multiple software technologies; grant of CTIA's clarification request is therefore warranted to facilitate such an environment.

CONCLUSION

PrimeCo urges the Commission to grant the BellSouth and CTIA petitions for reconsideration to the extent discussed herein.

Respectfully submitted,

PRIMECO PERSONAL COMMUNICATIONS, L.P.

A handwritten signature in black ink, appearing to read "William L. Roughton, Jr.", followed by a stylized mark that looks like "100".

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